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Supreme Court of the United States

OCTOBER TERM, 1967

No. 1023

SOUTHERN CONSTRUCTION COMPANY, INC., ET AL
Petitioners

versus

GENERAL ELECTRIC COMPANY
Respondent

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

R. EMMETT KERRIGAN
1800 Hibernia Bank Building
New Orleans, Louisiana 70112
Attorney for Petitioner

DEUTSCH, KERRIGAN & STILES
A. MORGAN BRIAN, JR.
Of Counsel

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Petitioners, Southern Construction Company and Continental Casualty Company, seek certiorari to review the judgment of the Court of Appeals for the Fifth Circuit in this case. In support of their petition, they respectfully show:

OPINIONS BELOW

The District Court rendered two opinions in favor of petitioners. The second affirmed the first after a rehearing. They are reported at 229 FS 873 and 236 FS 742 (WD La-1964).

The opinion of the Court of Appeals, reversing for respondent, is reported at 383 F2d 135 (CA 5-1967).

JURISDICTION

The Court of Appeals' judgment is dated August 28, 1967, and was entered the same date. Its order denying rehearing is dated and was entered on October 16, 1967. Jurisdiction of this Court lies under 28 USC § 1254(1).

QUESTION PRESENTED

In 1959 Congress amended the Miller Act's § 270b, but only in Subpart (b), to change the beginning of the one-year suit-filing period from the date certified by the Comptroller General for "final settlement of the contract" to the day when "the last of *the material*" was supplied by the claimant. 40 USC § 270b(b).

That amendment did not alter companion Subpart (a), which had always provided that the Act's 90-day pre-suit waiting and notice periods commence on the date when "the last of *the material for which such claim is made*" was supplied by the claimant. 40 USC § 270b(a).

The issue here is whether this newest mention of "*the* material" in amended Subpart (b) refers solely to the very same "material" first mentioned in unchanged Subpart (a), viz., that "for which such claim is made," thereby giving Congressionally-intended uniformity to the manner of beginning all three of the Act's limitation periods as stated by the Ninth Circuit and held by two district courts (including the lower court in the instant case); or whether, as the Fifth Circuit held in reversing the district court in this case, such new language in Sub-

part (b) means *any* material supplied by the claimant to the project, even material previously paid for and therefore not claimed in the suit, thus frustrating the amendment's uniformity purpose by leaving the start of the one-year period as divergent from that of the 90-day periods as it ever was under the pre-amendment "final settlement" criterion.

STATUTE INVOLVED

40 USC § 270b (part of the Miller Act) provides:

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after *the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made,* shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from *the date on which such person did or performed the last of the labor or furnished or supplied the last of the ma-*

terial for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons."

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after *the day on which the last of the labor was performed or material was supplied by him.*[1] The United States shall not be liable for the payment of any costs or expenses of any such suit." (emphasis added)

STATEMENT OF THE CASE

Respondent supplied materials over a 5-month period to Mojave, a subcontractor on a Miller Act project located within the Western District of Louisiana, Shreveport Di-

[1] The 1959 amendment substituted this italicized phrase for the words, "the date of final settlement of such contract." Act of August 4, 1959, P.L. 86-135, §1, 73 Stat. 279.

vision. Petitioners, respectively, are the prime contractor and surety on the statutory payment bond. Mojave ultimately defaulted, abandoning its work and leaving unpaid its account with respondent.

The last materials supplied by respondent to Mojave, before the default, were delivered to the site on March 30, 1960, and the next-to-last such materials were furnished there on March 8, 1960. R 66-68.

Right after the default, completion of Mojave's work was arranged through another subcontractor, Evans, who arranged, with respondent's express written consent, to transfer from Mojave's unpaid account to Evans' own new account, the charge for all the last materials furnished on March 30, 1960; and two months later, on May 31, 1960, Evans paid respondent in full for them. Thereafter, the last *unpaid* materials still a proper part of Mojave's account were the ones furnished on March 8, 1960. R 68-70.

Almost ten months after Evans paid respondent for the transferred terminal materials originally furnished on Mojave's account, respondent sued petitioners on the bond, under the Miller Act, for the remaining unpaid balance of Mojave's account. That suit was filed in the lower court on March 13, 1961, more than one year after respondent furnished the last of the materials then being claimed in the suit, but within one year from respondent's supply of the terminal materials Evans paid for long before suit. R 71-72.

The District Court granted petitioners' summary judgment, dismissing respondent's suit as not being timely filed within the one-year period contemplated by the Act's amended § 270b(b). R 105-124. After a rehearing, the District Court affirmed for petitioners. R 137-146.

Respondent appealed, and the Fifth Circuit reversed. R 146-163. Petitioners sought a rehearing, but the Court of Appeals denied it. R 164-176.

ARGUMENT

Legislative history of the 1959 Miller Act amendment, though not extensive, shows that it was Congress' intent to have all three of § 270b's suit-related limitation periods commence thereafter on the basis of one uniform "last furnishing" standard, rather than having one of them controlled by "final settlement" or any other equally divergent beginning point.[2]

The Ninth Circuit so stated in *United States for use of Austin vs Western Electric Co.*, 337 F2d 568 (CA 9-1964): "[A] subcontractor is required [by part (a)] to give *notice* of his claim within 90 days from the date on which he performed the last labor or furnished or supplied the last material *for which claim is made.* He must [under part (b)] file *suit* within one

[2] 2 U.S. Code Congressional & Administrative News (1959), at pp. 1995-2000, including the Senate Judiciary Committee's favorable report, urging passage, and a supporting opinion by the Comptroller General. See pertinent excerpts in Appendix hereof, at pp. 29-32.

year from *the same date*." (337 F2d, at 572, emphasis added.) Two District Courts, including the lower court in the case at bar, have held to the same effect.[3]

The rationale of *Austin's* explanation on the point and of the other courts' decisions referred to in footnote 3, above, is that Subpart (b)'s amended clause, "one year after the day on which the last of *the* . . . *material* was supplied by him," is not self-defining or self-descriptive. It is entirely relative. It speaks only of "*the*" material, not material generally or any other particular material specifically described elsewhere in part (b). Hence, that clause does not have any meaningful application unless it refers back to the language in part (a) which mentions "material" three times in related contexts that *are* self defining. First, part (a) links "material" with the supplier "who has not been paid" for it and who therefore "shall have the right to sue . . . for the amount . . . unpaid at the time of . . . such suit." Then part (a) twice alludes to "the material *for which such claim is made*," which clearly means (especially by use of the word "such") the claim sued on for only unpaid materials.

In the instant case, the Fifth Circuit arrived at the contrary conclusion by holding that part (b) does not need any interpretation because its meaning is clear without resort to either legislative history or the comparable clauses in part (a). (383 F2d, at 138, Appendix, at pp. 15-16.)

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[3] See Appendix, at pp. 18-41. See also *United States for use of McGrath vs Travelers Indemnity Co.*, 253 FS 330 (DC Ariz-1966). While that decision was not appealed to the Ninth Circuit, if it had been, presumably it would have been affirmed on the basis of the Ninth Circuit's prior statement in *Austin*.

This technique of slavish adherence to the letter of the statute without regard to the Congressional purpose in enacting it, or to the statutory scheme of which it forms an integral part, is contrary to the statutory construction technique applied by this Court in *NLRB vs Allis-Chalmers Mfg. Co.*, 388 US 175 (1966), and by the Second Circuit in the Miller Act case of *United States for use of Bryant Electric Co. vs Aetna Casualty & Surety Co.*, 297 F2d 665 (CA 2-1962).[4]

The Fifth Circuit's anomalous holding will greatly prejudice government contractors, especially small ones who, because of limited bonding capacity, usually cannot obtain further bonds on new jobs until after all liability on their existing work has terminated. And if there is any other material furnished or work performed after completion of a job (as for example on

[4] *Bryant* concerned only the jurisdictional (not the peremptive) clause of Subpart (b), which expressly restricts Miller Act suits to "the United States District Court for any district in which the contract was to be performed and executed *and not elsewhere*" (emphasis added). The job had been in Labrador where there are no United States District Courts, so the suit was filed in New York. Notwithstanding the statute's clear provision against such jurisdiction, the Second Circuit in *Bryant* interpreted Subpart (b) by reading into it words which simply are not there, either expressly or impliedly, and holding: "The language of § 270b(b) is unequivocal; actions are to be brought in the. . .district of performance 'and not elsewhere' . . . ." (297 F2d, at 667, n. 1) "[But]. . .It would be ironic indeed to find in [amended part (b)] a provision which in today's world would scuttle a major part of the bonding scheme. . . . We cannot accept a construction which would lead to such a result. . . . *The literal wording of the Miller Act cannot be invoked to defeat its manifest purpose.* . . . We must therefore read the limit of § 270b(b) on the place of suit as *pro tanto* inapplicable in those instances in which there exists no United States judicial district wherein the contract is to be performed. . . ." (297 F2d, at 668-669, emphasis added).

guaranty and corrective call-backs) for which no payment is due and hence no claim is ever made, but yet, under the Fifth's Circuit decision here, that suffices to extend for more than a year the time for filing suit on the last material or work for which claim is made, then it would seem that liability on bonds would not be considered terminated by sureties until all guaranty provisions of the contracts have been fulfilled.

In view of the large volume of Miller Act cases, it is obviously of great practical importance to the safe termination of exposure to liability and the expeditious disposition of litigation by the lower federal courts, that the inter-Circuit conflict as to exactly what "last furnishing" commences the one-year suit-filing period be resolved promptly by this Court.

CONCLUSION

When Congress amended the Miller Act's § 270b in 1959, it sought to provide one uniform "last furnishing of material" basis for commencing the two 90-day limitations in part (a) and the one-year peremption of part (b), thereby eliminating all the confusion and uncertainty for suppliers, contractors and sureties which they formerly experienced under the old "final settlement" standard. But that Congressional intent is being frustrated and a new area of comparable confusion has arisen from the divergent interpretations of amended part (b)'s "last furnishing" clause and its relationship to the one in part (a). Prompt resolution of this conflict and important question

of federal law is essential to proper judicial administration.

It is accordingly respectfully submitted that certiorari should be granted herein.

R. EMMETT KERRIGAN
Attorney for Petitioners

DEUTSCH, KERRIGAN & STILES
A. MORGAN BRIAN, JR.
Of Counsel

CERTIFICATE

I hereby certify that copies of the foregoing petition for certiorari have been mailed by depositing same in a United States mail box, with first class postage prepaid (air mail for the one going out of this city), addressed to each counsel for respondent at his post office address as follows: Cromwell Warner, Jr., Esq. of Messrs. Meserve, Mumper & Hughes, 500 Mobil Building, 612 South Flower Street, Los Angeles, California 90017; Michael H. Bagot, Esq., 1825 Commerce Building, New Orleans 70112; and Jesse S. Guillot, Esq., National Bank of Commerce Building, New Orleans 70112. And thereby all parties required to be served herewith have been served.

New Orleans, Louisiana, January 13, 1968.

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R. EMMETT KERRIGAN

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